

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PEREZ TOMAYO TULIO,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No. 05-120E
	)	JUDGE SEAN McLAUGHLIN
JAMES SHERMAN,	)	MAGISTRATE JUDGE BAXTER
	)	
Respondent.	)	

**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

**I. RECOMMENDATION**

It is respectfully recommended that the instant Petition for Writ of Habeas Corpus filed by a federal prisoner be denied.

**II. REPORT**

Perez Tomayo Tulio is a federal prisoner currently incarcerated at FCI McKean serving a sentence of 77 months incarceration imposed by the United States District Court for the Eastern District of New York. He asserts that the Bureau of Prisons is improperly applying the Good Conduct Time ("GCT") provision set forth at 18 U.S.C. §3624(b)(1). In this respect, he makes an argument similar to the one accepted by the District Court in White v. Scibana, 314 F.Supp.2d 834 (W.D.Wisc. 2004), that the BOP's practice of calculating GCT based on the time served deprives prisoners of the opportunity to earn additional GCT to which they are statutorily entitled. Petitioner does not expressly cite to White, however, likely because the district court's decision in White was reversed on appeal by the Seventh Circuit at White v. Scibana, 390 F.3d 997 (7<sup>th</sup> Cir. 2004), cert. denied by White v. Hobart, --- U.S. ----, 125 S.Ct. 2921, 162 L.Ed.2d 297 (2005). Further, and more importantly for our purposes, the Court of Appeals for the Third Circuit took up the issue in O'Donald v. Johns, 402 F.3d 172 (3d Cir.2005), ruling that the BOP's calculation of GCT based upon the time actually served, rather than the sentence imposed, is a reasonable interpretation of § 3624(b) to which this Court must defer. Petitioner's additional argument that the rule of lenity applies was also rejected by the O'Donald court. Accordingly,

this petition should be dismissed on the authority of O'Donald.

### **III. CONCLUSION**

For the foregoing reasons, it is respectfully recommended that this Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2241 be denied.

In accordance with the Magistrates Act, 28 U.S.C. § 636(b)(1)(B) and (C), and Rule 72.1.4(B) of the Local Rules for Magistrates, the parties are allowed ten (10) days from the date of service to file objections to this report and recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ Susan Paradise Baxter  
SUSAN PARADISE BAXTER  
UNITED STATES MAGISTRATE JUDGE

Dated: July 31, 2006

cc: The Honorable Sean J. McLaughlin  
United States District Judge

PEREZ TOMAYO TULIO  
67020-053  
FCI McKean  
P.O. Box 8000  
Bradford, PA 16701

Christy Wiegand  
United States Attorney's Office  
700 Grant Street  
Suite 4000  
Pittsburgh, PA 15219